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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. ~~118 Misc.~~ 429

SAM ZIMMERMAN,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF THE STATE OF MARYLAND IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals of Maryland has not yet been reported officially. It may be found, however, in 59 A. 2d 675, at pages 194-206 of the Transcript of Record, and at pages 67-75 of the printed Record.*

* The term "Transcript of Record" refers to the complete typewritten Transcript of Record as certified to this Court by the Court of Appeals of Maryland. The term "Record" and the symbol "R" cover the printed portions of the Record as filed by Petitioner and Respondent in the Court of Appeals of Maryland, and the Opinion of that Court, and submitted herewith to each of the Justices of this Court.

JURISDICTION

The judgment of the Court of Appeals of Maryland sought to be reviewed was entered on June 16, 1948 (R. 67). The petition for a Writ of Certiorari was filed on September 13, 1948. The jurisdiction of this Court is invoked under the provisions of Section 1(b) of the Act of February 13, 1925 (Section 237(b) of the Judicial Code; 28 U.S.C.A., sec. 344(b)).

QUESTIONS PRESENTED

I.

Whether the trial and conviction of the petitioner was upon an indictment found and returned by a grand jury on which Negro members had been excluded solely on account of race or color, pursuant to an established systematic and continuous practice, in denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

II.

Whether the petitioner showed a long continued and systematic exclusion of Negroes selected for grand jury service in the City of Baltimore and thus made a prima facie showing of unconstitutional racial discrimination in the selection of grand juries in the City of Baltimore, which the State failed to rebut.

III.

Whether the rights of the petitioner were prejudiced by the trial court's rulings on evidence produced at the hearing on petitioner's motion to quash the indictment against him?

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IV.

Whether the grand jury which indicted the petitioner was selected in accordance with the methods prescribed for the selection of grand juries by the Charter and Public Local Laws of Baltimore City.

STATEMENT OF FACTS

The petitioner was indicted by the May Term, 1946, Grand Jury of Baltimore City for murder and he was arraigned and pleaded not guilty. After his plea, petitioner asked leave of the lower court to withdraw his plea of not guilty and moved to quash the indictment on the ground that the grand jury was not selected in accordance with the requirements of the Charter and Public Local Laws of Baltimore City and that the indictment conflicted with the provisions of the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution and their counterparts in the Constitution of the State of Maryland. The lower court struck out the plea of not guilty and a hearing was held on the petitioner's motion to quash, at the conclusion of which the petitioner's motion was overruled. Thereafter, the petitioner again plead not guilty, was found guilty of murder in the first degree and sentenced to life imprisonment; he appealed to the Court of Appeals of Maryland, which affirmed the judgment of the lower court.

The selection of grand juries in the City of Baltimore is made before each term of the Criminal Court by the unanimous vote of the members of the Supreme Bench. This selection may be made from two sources, i.e. (1) from a list of seven hundred and fifty (750) names drawn from the jury service file which is prepared in the office of the jury clerk, and (2) from a secondary list of grand jury

nominations made by the individual members of the Supreme Bench.

The first step in selecting grand juries in Baltimore City is the preparation of the jury service file. This file consists of the names of sixteen thousand (16,000) persons, more or less, who are residents of the City. In preparing the jury service file, the jury clerk makes a list of prospective jurors by taking names from tax lists, voting lists, the criss-cross telephone book, the automobile book and the city directory (R. 56). Persons thus selected are sent "pink slips" through the mails which fix a time and place for the holding of an examination before the jury judge for the purpose of determining the qualifications as jurors of such persons. If such qualifications are found to exist, special cards are made out for the candidates in question which contain all pertinent information relative to the prospective jurors (R. 57). The candidates then become members of the jury service file.

Prior to the commencement of each term of criminal court, the jury clerk is required to forward to the Supreme Bench a list of seven hundred and fifty (750) persons from the jury service file (R. 45). This list usually contains the names of fifty (50) Negroes. The selection of the grand jury is then made by the Supreme Bench from that list of names "which is augmented by a list of suggestions made by the various judges" (R. 15, 16).

The list of suggestions made by the various judges referred to above begins with a list of persons known by or recommended to the individual members of the Supreme Bench, such persons being deemed by the judges as qualified for grand jury service. Every judge may make suggestions of anywhere from two to fifteen names, the result being a composite list which varies from forty-two (42) to

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sixty-two (62) names (R. 62). The number of Negroes on this composite list may vary from four (4) to eight (8) persons (R. 62). These Negroes are selected by different members of the Supreme Bench (R. 54).

Each judge, after assembling his grand jury nominations, forwards the list to the Chief Judge who, in turn, sends the list to the jury clerk. The jury clerk checks each name on the list for the purpose of determining the age, occupation, residence, race, prior jury service and all other relative information concerning the grand jury candidates (in many cases this information is obtained from the jury service file). After he has collected all of the above described information, the jury clerk tabulates his findings opposite the names of each grand jury candidate on a new list which is prepared in his office.

The list of grand jury nominations made by the judges together with the list of seven hundred and fifty (750) names prepared from the jury service file are turned over by the jury clerk to the clerk of the Supreme Bench. Upon the receipt of those two lists, the clerk of the Supreme Bench inserts all of the names in the "Supreme Bench of Baltimore City Jury Book". At the same time the clerk draws a certification to be signed by the judges which will indicate the names of persons qualified to serve as grand and petit jurors. Thereafter, the "Supreme Bench of Baltimore City Jury Book" together with the certification are taken to the judges consultation room.

After the "Supreme Bench of Baltimore City Jury Book" and the list of judges' nominations for grand jury service are deposited in the Supreme Bench consultation room, the grand jury is selected by the unanimous action of all of the judges. In selecting the grand jury there is no stereotyped course of procedure within the consultation room, the meet-

ing being open to "a free and frank discussion among the Judges as to the qualifications of persons to serve on the Grand Jury" (R. 55). When the judges have agreed on 23 names, the clerk of the Supreme Bench is called to the consultation room and given a list of those names, signed by the judges, which list ultimately constitutes the grand jury. The clerk retypes the list, and sends copies thereof to the Sheriff's office and to the jury clerk's office.

In some cases, a grand jury is unable to organize because one or more persons theretofore selected to serve have been excused. It then becomes necessary to hold a special meeting of the Supreme Bench to fill the vacancies thus occasioned. In such instances, persons of the Negro race have been telephoned for the purpose of determining whether they are available for jury service (R. 54).

In 1942 the method by which grand and petit juries were selected in the City of Baltimore was challenged in the United States District Court for the District of Maryland, *United States ex rel Jackson v. Brady*, 47 Fed. Supp. 362 (D. Md. 1942). The contention in that case was that Negroes had been systematically, arbitrarily or intentionally excluded from both grand and petit jury service. The District Court did not rule specifically on the method by which grand juries had been selected, but did find that the petit juries had not been selected in violation of the mandates of the equal protection clause of the 14th Amendment to the Federal Constitution. In 1943 this decision was affirmed on appeal, *United States ex rel Jackson v. Brady*, 133 F. (2d) 476 (C.C.A. 4th, 1943), and certiorari was denied by this Court, 319 U. S. 746 (1943).

Late in 1944, the judges of the Supreme Bench took several steps to improve the method of selecting grand and petit juries for the City of Baltimore. One important step

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taken by the Bench was the inauguration of a Thursday luncheon meeting which is attended by all of the judges. At these meetings the selection and composition of grand and petit juries is discussed, the participation of Negroes in jury service being one of the topics (R. 46). In addition, the judges of the Supreme Bench have done the following things in regard to jury selection and service (R. 47):

1. Ordered the removal of distinguishing marks after the names of colored jurors.

2. Approved the bill to repeal the exemption of honorary members of the Maryland Militia from jury service.

3. Recommended the increase of the pay of jurors and transfer of control over the rate of pay of jurors to the Board of Estimates of Baltimore City.

4. Appointed a committee of judges to study the jury system, and make recommendations looking to:

(a) Broadening the representative character of the basic jury list, and

(b) Improvement in the method of selecting persons for jury service.

Eleven Negroes have been picked to serve on the grand juries in Baltimore City, which have been drawn since the inauguration of the improved method of selecting such juries as outlined above. Of this number, two have been excused from jury service, while nine Negroes have actually served (R. 47).

The petitioner was indicted by the May Term, 1946, Grand Jury. Chief Judge Smith was the jury judge during 1946 (R. 51).

The May Term, 1946, Grand Jury was selected by the members of the Supreme Bench from (a) a list of seven hundred and fifty names supplied to the Bench by the jury clerk, and (b) the nominations of the individual Judges for grand jury service. The list of seven hundred and fifty names contained the names of approximately fifty Negroes. Prior to 1944, the list of seven hundred and fifty names contained the names of approximately twenty-five Negroes. Since 1944, this list has contained the names of approximately fifty Negroes (R. 22). The nominations made by the individual judges of the Supreme Bench for Jury service in the selection of the May Term, 1946, Grand Jury contained the names of six Negroes (R. 52).

Of the twenty-six persons selected to serve on the Grand Jury for the May Term, 1946, three were Negroes (R. 65). As originally selected by the members of the Supreme Bench, the May Term, 1946, Grand Jury contained two members of the Negro race. These gentlemen could not serve and were voluntarily excused (R. 64-65).

A special meeting of the Supreme Bench was held for the purpose of filling the vacancies caused by the fact that the two Negroes originally selected to serve on the Grand Jury (and one white man) had been excused. The three substitutions, which were "not made specifically one person for another" (R. 65) contained the name of one colored man.

The petitioner offered the testimony of a former Chief Judge of the Supreme Bench of Baltimore City and three former associate judges of the Supreme Bench to show the method of selecting grand juries prior to 1944. In the lower court, this testimony was refused to be admitted. The Court of Appeals, however, treated the testimony as

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having been admitted and found that it had no probative value to show unconstitutional discrimination in the selection of the grand jury which indicted the petitioner even if it were assumed that it showed such discrimination in the selection of grand juries prior to 1944.

ARGUMENT

I.

THE RECORD IN THIS CASE FAILS TO SUBSTANTIATE PETITIONER'S CLAIMS THAT NEGROES WERE SYSTEMATICALLY AND INTENTIONALLY EXCLUDED FROM THE GRAND JURY WHICH INDICTED HIM IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION AND THE DECISIONS OF THIS COURT.

The Court of Appeals of Maryland has never failed to recognize the binding force of the decisions of this Court in *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664 (1879); *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667 (1879); *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567 (1881); *Bush v. Kentucky*, 107 U. S. 110, 27 L. Ed. 354 (1882); *Carter v. Texas*, 177 U. S. 442, 44 L. Ed. 839 (1900); *Norris v. Alabama*, 294 U. S. 587, 79 L. Ed. 1074 (1935); *Rogers v. Alabama*, 192 U. S. 226, 48 L. Ed. 417 (1903); *Hollins v. Oklahoma*, 295 U. S. 394, 79 L. Ed. 1500 (1935); *Hale v. Kentucky*, 303 U. S. 613, 82 L. Ed. 1050 (1938); *Pierre v. Louisiana*, 306 U. S. 354, 83 L. Ed. 757 (1939); *Smith v. Texas*, 311 U. S. 128, 85 L. Ed. 84 (1940); *Hill v. Texas*, 316 U. S. 400, 86 L. Ed. 1559 (1942); *Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692 (1945); *Patton v. Mississippi*, 332 U. S. 463, 92 L. Ed. Adv. Ops. 164 (1947); *Fay v. New York*, 332 U. S. 261, 91 L. Ed. 2043 (1947); *Moore v. New York*, ... U. S. ....., 92 L. Ed. 637 (1948). Exclusive of the case at bar, it has on four occasions considered contentions similar or identical to those made in the case at bar, *Cooper v. State*, 64 Md. 40 (1885); *Lee v. State*, 163 Md. 56 (1932);

Lee v. State, 164 Md. 550 (1933); *cert. den.* 290 U. S. 639 (1933) and *Jackson v. State,* 180 Md. 658 (1942). And in the first *Lee* case (163 Md. 56), where it found that the trial judge, in drawing a petit jury in Baltimore County, had systematically, intentionally or arbitrarily excluded Negroes from the panel because of their race, the Court of Appeals did not hesitate in reversing the conviction. Moreover, the method by which grand and petit juries are selected in the City of Baltimore was challenged unsuccessfully in 1942 in *U. S. ex rel. Jackson v. Brady,* 47 F. Supp. 362 (D. Md., 1942) and the findings by the District Court that Negroes under the method then in use had not been systematically, arbitrarily or intentionally excluded from petit jury service was affirmed on appeal in *U. S. ex rel. Jackson v. Brady,* 133 F. (2d) 476 (C.C.A. 4th, 1943), *cert. denied,* 319 U. S. 746 (1943).

The petitioner contends, however, that the method of selecting grand juries in Baltimore City, which has been changed since 1944 so as to permit a greater number of Negroes to serve than theretofore, is in violation of the Fourteenth Amendment to the Federal Constitution. This contention is based upon the Petitioner's interpretation of the opinion of this Court in *Smith v. Texas,* 311 U. S. 128, 85 L. Ed. 84 (1940) and *Akins v. Texas,* 325 U. S. 398, 89 L. Ed. 1692 (1945). While the petitioner argues broadly that the test to be applied, in determining whether or not the May Term, 1946, Grand Jury in Baltimore City was selected in contravention of the petitioner's constitutional rights, is whether there was limitation on the number of Negroes and not whether there was a systematic, arbitrary exclusion of or discrimination against Negroes, he is forced to the conclusion, even from the consideration of the *Smith* case alone, that the test to be applied is that of discrimination against Negroes in the selection of grand juries and

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not merely limitation or exclusion of Negroes. That such must be his conclusion is dictated by all of the decisions of this Court prior to *Smith v. Texas, supra,* and *Hill v. Texas, supra,* and two of the more recent decisions of this Court in *Akins v. Texas, supra,* and *Moore v. New York, supra.*

In the *Akins* case, although the defendant contended that the equal protection clause of the Federal Constitution guaranteed to him not only the right to have Negroes considered as prospective jurors, but also the right to have them considered without numerical or proportional limitation, the majority of this Court rejected the argument and stated at 325 U. S. 398, 404:

> "* * * the mere fact of an inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present which may be proved by a systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination."

And in *Moore v. New York, supra,* where it appeared that a blue ribbon jury was selected from one hundred and fifty names drawn from the jury panel under the supervision of a Justice of the State Supreme Court and that there were no Negroes on the jury list as drawn, this Court in sustaining the indictment against the argument that the systematic limitation on the number of Negroes on a jury panel was sufficient to vitiate the proceedings, said:

> "It is admitted that on this panel of one hundred and fifty there was no Negroes. But not only is the record wanting in proof of intentional and systematic exclusion — the only witnesses sworn testified that there was no such practice or intent. Nothing in the background facts discredits this testimony. * * * The record is utterly devoid of proof of systematic, intentional and deliberate exclusion of Negroes from jury duty."

The petitioner attempts to limit the language and the scope of the decision in *Akins v. Texas, supra,* on the ground that the grand jury selected there was but the second grand jury selected after the decision in *Hill v. Texas, supra,* and that, therefore, there was no possibility of showing a continual and systematic, discriminatory exclusion or practice in the selection of that jury. The grand jury considered in *Akins v. Texas, supra,* is analogous to the grand jury which indicted the petitioner. The method of selecting both grand juries and petit juries in Baltimore City was considered in *U. S. ex rel. Jackson v. Brady, supra;* and although in those cases that method was found to be immune to constitutional attack, the record is clear that the method of selecting grand jurors in Baltimore City since the decision in those cases has been materially altered. Such was the finding of the trial court and the Court of Appeals of Maryland, and although it is not suggested that their findings in the last analysis are binding on this Court where the question of a denial of a constitutional right is concerned, yet, as pointed out in *Akins v. Texas, supra,* and *Pierre v. Louisiana, supra,* the findings of the State courts in this respect are entitled to great weight and are highly persuasive of the result to be reached in this Court. Moreover, the petitioner's interpretation of the *Akins* case, *supra,* completely ignores the decision of this Court in the *Moore* case, *supra,* where the factors relied on by the petitioner to limit the scope of the *Akins* case were not present.

Although the situation in the instant case is analogous on its fact to the *Akins* case and to the result reached there, because a different method of selecting grand juries had been employed since 1944 and no discrimination since that date has been shown, the petitioner tries to bring the instant case within the scope of the general statements contained in the majority opinion in that case in his conclu-

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sion that the petitioner's constitutional rights were violated. His repeated references to the practice concerning the selection of grand juries since 1910 do not accomplish that result because in the *Akins* case the fact of change in the method of selecting grand juries in compliance with the mandate of this Court in *Smith v. Texas, supra,* and *Hill v. Texas, supra,* was held to make evidence of the method of selecting grand juries prior thereto without legal significance. Nor is his argument meritorious that the Court of Appeals in its use of the word "invariable" adopted a more stringent test to determine if the petitioner's constitutional rights had been violated than that adopted by this Court in the *Akins* case. It is clear from the opinion of the Court of Appeals that the test it used was invariable "systematic exclusion" and not a test of an invariable number of Negroes on grand juries, although it clearly recognized, in deference to the holdings of this Court in *Smith v. Texas, supra, Hill v. Texas, supra, Norris v. Alabama, supra, Pierre v. Louisiana, supra,* and *Patton v. Mississippi, supra,* that evidence of an invariable practice may in itself show systematic exclusion.

In an effort to escape the effect of the decision of the *Akins* case and the conclusion that the Court of Appeals correctly decided the petitioner's case, the petitioner attacks the findings of the trial court and the Court of Appeals to the effect that (a) the method of selecting grand juries in Baltimore City was changed in 1944 and (b) that no evidence of discrimination in the selection of grand juries since that date was produced. As a basis for his attack, petitioner places complete reliance on the fact that from 1910 to 1944 each grand jury in Baltimore City contained only one Negro member. Attention is drawn (a) to certain testimony of one associate judge of the Supreme Bench of Baltimore City which petitioner believes is vague and

inconclusive and (b) to one statement of the Chief Judge of the Supreme Bench of Baltimore City which was later amplified. The petitioner attempts to minimize the undisputed fact that since 1944 a conscious and purposeful attempt has been made to broaden the base from which juries, both grand and petit, are selected. Moreover, it is undisputed that in the year 1945 each of two grand juries contained two Negro members and of the twenty-six persons drawn for the grand jury which indicted the petitioner three were Negroes, two of whom asked to be excused from jury service, and one actually served. Thus, experience since 1944 demonstrates that in fact a change in the selection of grand juries has taken place.

It is submitted that the petitioner has failed to point to any facts in the record which, under the holdings of this Court, show that any of his constitutional rights were violated in the selection of the grand jury which indicted him.

II.

THE PETITIONER FAILED TO MAKE A PRIMA FACIE SHOWING OF UNCONSTITUTIONAL RACIAL DISCRIMINATION IN THE SELECTION OF THE GRAND JURY WHICH INDICTED HIM.

The petitioner's contention that he made out a prima facie case of unconstitutional racial discrimination in the selection of grand juries in Baltimore City, which the State failed to rebut, is grounded solely on facts occurring prior to 1944. Even in 1944, Judge Chesnut in *U. S. ex rel. Jackson v. Brady, supra,* held that similar contentions were without foundation in fact. Since the change in method of selecting grand juries since 1944 such facts are without probative value to establish that there was systematic, intentional or arbitrary exclusion of Negroes from the May Term, 1946, Grand Jury which indicted the petitioner, *Akins v. Texas, supra.*

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The petitioner's comparision of the number of Negroes in the population of Baltimore City and the number of Negroes which have served on grand juries in Baltimore City proves nothing, *Akins v. Texas, supra, Fay v. New York, supra, Moore v. New York, supra.*

III.

THE PETITIONER'S RIGHTS WERE NOT PREJUDICED BY THE TRIAL COURT'S RULINGS ON THE EVIDENCE.

The petitioner complains because the trial court refused to permit the testimony of several former members of the Supreme Bench of Baltimore City with respect to the selection of grand juries in Baltimore City from 1922 to 1944. When the admission of this testimony was refused, petitioner's counsel, in accordance with the Maryland practice, made a proffer of what he proposed to prove. Although the trial court, in making its findings, did not refer to the evidence which the petitioner sought to introduce, the Court of Appeals in reviewing the case *treated all of the proffered evidence as having been admitted.* Nevertheless, the Court of Appeals found that such evidence was not sufficient to show a systematic discrimination against Negroes serving on grand juries in Baltimore City because of their color when it was considered that (a) on the January Term, 1945, Grand Jury, two Negroes were certified as members and both served, that (b) on the September Term, 1945, Grand Jury, two Negroes were certified as members and both served and that (c) on the grand jury which indicted the petitioner three Negroes were certified to serve, two of which voluntarily asked to be excused and one of which actually served. It is submitted that in this respect the petitioner's contentions are without merit.

IV.

THE GRAND JURY WHICH INDICTED THE PETITIONER WAS SELECTED IN ACCORDANCE WITH THE METHODS PRESCRIBED FOR THE SELECTION OF GRAND JURIES BY THE CHARTER AND PUBLIC LOCAL LAWS OF BALTIMORE CITY.

The petitioner contends that grand juries in Baltimore City have not been selected in accordance with Sections 687, 689 and 694 of the Charter and Public Local Laws of Baltimore City (1938 Edition), and he contends that the failure to comply with these provisions has permitted and contributed to discrimination against Negroes serving on grand juries in Baltimore City. It is sufficient to say that the Court of Appeals found that the grand jury which indicted the petitioner was selected in accordance with the statute and that such a ruling, involving as it does purely the construction of a State statute, is one which this Court has on many occasions held that it will not review. Similarly, the petitioner's contention that, under the construction of the statute adopted by the Court of Appeals, discrimination may occur is one which has no substance. The petitioner has not shown that discrimination in fact did occur and that obviously is the only issue before this Court.

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CONCLUSION

The decision of the court below is correct. It conflicts in no way with any of the decisions of this Court, nor does it present any new or novel question. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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